

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel



October 10, 2017

VIA ELECTRONIC MAIL

Ms. Natasha Rodriguez

RE: FOIA Appeal 2017-164

Dear Ms. Rodriguez:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Department of Health ("DOH") failed to adequately respond to your request for certain records.

Background

On June 29, 2017, you submitted a request to DOH seeking emails regarding the Blue Collar Cat program administered by the Humane Rescue Alliance ("HRA"). On August 2, 2017, DOH granted your request asserting that its disclosure contained all responsive emails.

Subsequently, you appealed DOH's response to this Office based on your belief that additional records should exist. You assert on appeal that the Blue Collar Cat program launched on March 15, 2017; however, DOH's disclosure included only one email from HRA dated April 7, 2017. You further assert that DOH should disclose all relevant emails from HRA employees to the extent that HRA is performing a public function on behalf of the district.

This Office notified DOH of your appeal and it responded on October 1, 2017.¹ In its response, DOH reasserted that it disclosed all responsive emails based on the timeframe and search terms provided in your FOIA request. DOH also stated that the Blue Collar Cat program is a private initiative of the HRA; therefore, HRA's internal records on the program are outside the scope of FOIA as public function performed on behalf of DOH.

Discussion

It is the public policy of the District of Columbia that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who

¹ A copy of DOH's response is attached for your reference.

represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The crux of your appeal is that you believe DOH should possess more responsive records than it provided you because the Blue Collar Cat program launched weeks before the earliest email DOH disclosed. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. U.S. Dep’t of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

‘the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’ [*Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a ‘reasonableness test to determine the ‘adequacy’ of a search methodology, *Weisberg v. United States Dep’t of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) search for the records in those locations. *Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step includes determining the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

DOH described the search it conducted in response to your request. In specific, the agency identified the employees of the Animal Services Program who would have corresponded with HRA and then searched the emails of those employees using the terms identified in your request.

In response to your assertion on appeal that FOIA extends to contractors performing public functions on behalf of agencies, DOH explains that the Blue Collar Cat program is not a public function performed on its behalf but rather a private initiative of the HRA. As a result, HRA's internal documents and correspondence regarding the program, which have not been shared with DOH, are not subject to FOIA. Due to the fact that the additional records you seek involve a private initiative of HRA not subject to FOIA, we find here that DOH made a reasonable determination as to the locations of the records you requested and conducted an adequate search of these locations for the public records in its possession.

Conclusion

Based on the foregoing, we affirm DOH's response to your request, insofar as the searches it conducted were adequate.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Edward Rich, Senior Assistant General Counsel, DOH (via email)